

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

FIRST APPEAL No 1360 of 1989
with
FIRST APPEAL NO 1361 of 1989

For Approval and Signature:

Hon'ble MR.JUSTICE M.H.KADRI

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1. Whether Reporters of Local Papers may be allowed to see the judgements?
2. To be referred to the Reporter or not?
3. Whether Their Lordships wish to see the fair copy of the judgement?
4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?
5. Whether it is to be circulated to the Civil Judge?

AHMEDABAD MUNICIPAL CORPORATION

Versus

DASHRATHLAL BECHARDAS PATEL

Appearance:

MR BP TANNA for the Appellant in both the Appeals.

MR MB GANDHI for Respondent in both the appeals.

CORAM : MR.JUSTICE M.H.KADRI

Date of decision: 28/02/97

COMMON C.A.V.JUDGEMENT

Appellant - Municipal Corporation of the City of Ahmedabad by filing the above appeals under S.96 of the Code of Civil Procedure, has challenged the judgments and decree dated September 25, 1989 passed by the learned City Civil Judge, 5th Court, Ahmedabad in Civil Suits No. 5710/88 and 6175/88.

2. Plaintiff Dashrathlal Bechardas Patel, an ex-employee of the appellant Corporation filed Civil Suit No. 5710/88 in the City Civil Court, for a declaration that the action of the appellant Corporation of not granting him the benefit of the pension scheme was illegal. According to the plaintiff, he joined the service of the appellant Corporation as a Clerk on the Advocates' establishment on 20.10.1970, and retired as such from service on 31.7.1983. The plaintiff-respondent and other 7 clerks had filed a reference bearing No.(IT) 448/77 before the Industrial Tribunal at Ahmedabad, as they were not given benefits like other regular clerks by the appellant Corporation. On 28.12.1982, the Industrial Tribunal declared the award and as per the award, the plaintiffs and other 7 clerks were given revision in their pay scales with effect from 1.1.1980. The said award of the Industrial Tribunal was challenged by the appellant Corporation by filing SCA No. 1145/83 in this High Court. In the said SCA No. 1145/83, 8 employees including the plaintiff entered into a compromise with the appellant corporation, filed consent terms and they were ordered to be enlisted in the cadre of Clerks. As per the consent terms, the benefits of grade revision was also given to the 8 employees and they were to be placed last in the seniority list of the respective cadres. It is averred that as per the consent terms filed in SCA No. 1145/83, the plaintiff was given grade revision and he was put as Senior Clerk in the pay scale of Rs.330-560/-, effective from 1.1.1980. The plaintiff retired as a Senior Clerk on 31.7.1983, and the appellant had given him retirement benefits, but no pensionary benefits were given to him. It is the plaintiff's case that even though he had completed full and continuous 5-year service with the Corporation, he was not granted pensionary benefits as per the pension scheme, which came into force from 1.1.1983.

3. Civil Suit No. 6175/88 was filed by Jayantilal H. Mehta who is the respondent in First Appeal No. 1361 of 1989, against the appellant Corporation, challenging the action of the appellant Corporation of not granting him pensionary benefits as per the pension scheme which came into force on 1.1.1983. This plaintiff was also serving as a Clerk from 1.8.1962 on the Advocates' establishment of the appellant corporation. As no benefits were given to the advocate's clerks, the plaintiff alongwith 7 others filed Reference (IT) No. 448/77 before the Industrial Tribunal at Ahmedabad. The Industrial Tribunal had declared the award on 28.12.1982. On the basis of the said award, 8 clerks who were working

on the Advocates' Establishment were given revision of their pay scales with effect from 1.1.1980. The said award was challenged by the appellant Corporation by filing SCA No. 1145/83 in the High Court, wherein consent terms were filed and the plaintiff and 7 other clerks were considered to be in regular service of the appellant corporation. As per the compromise arrived at between the 8 clerks and the Corporation, the plaintiff of this suit was put as Senior Clerk in the pay scale of Rs.330-560/- with effect from 1.1.1980. The plaintiff retired as Senior Clerk on 31.7.1983 and was given all the retirement benefits, but no pensionary benefit was given to him. It is the plaintiff's case that as no gratuity was given to him, he approached the competent authority under the Payment of Gratuity Act, (for short 'the Act') and the competent authority had passed an order directing the appellant Corporation to grant the plaintiff gratuity as per rules. The said order of the competent authority was challenged by the appellant corporation by filing review application before the competent authority which came to be rejected. Thus the plaintiff's case is that he was ultimately paid the gratuity treating him as an employee in regular service of the corporation with effect from 1962 to 1983. The Corporation has floated Pension Scheme effective from 1.1.1983, and the willing employees were entitled to enrol for getting pension under the said scheme. Therefore, the plaintiff on 9.11.1987 opted for that scheme. However, the appellant corporation did not consider that application and rejected the same on the ground that as on the date of retirement, the plaintiff had not completed 5 years full and continuous service with the appellant Corporation, his request for grant of pension cannot be granted. The plaintiff, after the above decision of the Corporation served statutory notice on the Corporation and filed the suit for declaration as stated above.

4. In both the suits, the appellant Corporation contested the suit by filing written statement, inter alia contending that both the plaintiffs have not completed 5 years continuous service and therefore, they were not entitled to the benefits under the pension scheme. That the plaintiffs were considered as employees of the appellant corporation from 1.1.1980 only and as they retired from 31.7.1983, they have not completed 5 years service with the corporation and therefore, they are not entitled to pension under the scheme. It is the contention of the appellant Corporation that the plaintiffs were not the employees of the Corporation since 20.10.1970 and 1.8.1962 respectively because they

were simply Gumasta-Clerks of the Advocates. It is also the contention of the appellant Corporation that the plaintiffs were claiming benefits of pension scheme with effect from 31.7.1983, i.e. the date of their retirement, but they have not filed the suit within six months from the date of accrual of the cause of action and therefore, the suit was not maintainable at all.

5. The learned City Civil Judge, Ahmedabad framed Issues at Ex.20/A in Civil Suit No.5710/88 and at Ex.15/A in Civil Suit No.6175/88. The plaintiffs as well as the appellant Corporation did not adduce any oral evidence. They mainly relied on the documentary evidence which consisted of xerox copy of the order of the High Court in SCA No. 1145/83, xerox copy of the order dated 6.12.1985 passed by the Competent Authority under the Act, in favour of the plaintiffs and the statutory notices served on the appellant Corporation by both the plaintiffs. The appellant Corporation produced the xerox copy of its resolution/circular No.52, dated 6.7.1983, i.e. the Pension Scheme.

6. The learned City Civil Judge, 5th Court, Ahmedabad, who heard both the suits came to the conclusion that the plaintiff of Civil Suit No. 5710/88 and plaintiff of Civil Suit No. 6175/88 were treated in continuous service since 1970 and 1962 respectively by the competent authority under the Act and had granted gratuity as per the rules and regulations. The learned Judge also concluded that both the plaintiffs had completed five years of service before retirement on 31.7.1983 and therefore, they were entitled to get pension as per the pension scheme floated by the appellant Corporation. The learned City Civil Judge held that the plaintiffs' suits were within the period of limitation. On the basis of the aforesaid conclusions both the suits were decreed and it was held that the plaintiffs were entitled to get pensionary benefits, and the order of the appellant Corporation rejecting their application for grant of pension was illegal, arbitrary and not maintainable at law. The learned trial Judge also directed the appellant corporation to grant to the plaintiffs pension in accordance with the scheme with effect from 1.8.1983. The judgments and decree of the learned City Civil Judge, 5th Court, Ahmedabad passed in Civil Suits No. 5710/88 and 6175/88 are challenged by the appellant Corporation by way of these appeals.

7. As identical questions of facts and law are involved in both these appeals, they are disposed of by this common judgment.

8. The learned Senior Counsel Mr. BP Tanna for the appellant Corporation has vehemently argued that the plaintiffs-respondents were only considered as the employees of the Municipal Corporation when the consent terms were recorded by the Division Bench of the High Court. It is further submitted that both the plaintiffs were not the servants of the Municipal Corporation and they were only rendering services on contractual basis to the Advocates of the Corporation. It is submitted that the plaintiffs having not completed 5 years effective service prior to the date of their retirement as per the pension scheme, they were not entitled to claim pensionary benefits. It is the submission of the learned Senior Advocate for the Corporation that by the order of the competent authority under the Act, the plaintiffs cannot claim that they are also entitled to get pensionary benefits. It is contended that the order of the competent authority under the Act will not confer any pensionary benefits on the plaintiffs.

9. The learned Counsel for the respondents-plaintiffs has contended that both the plaintiffs were rendering service to the appellant corporation since the year 1970 and 1962 respectively as Advocates' Clerk, and that the competent authority under the Act had granted them gratuity treating their service as continuous since the time they joined the service as Advocates' Clerk, who are attached to the Municipal Corporation. The learned Counsel for the respondents also contended that during the pendency of these appeals also, the respondents were given pensionary benefits by the interim order of this court and therefore, the appeals should be dismissed.

10. It is an admitted fact that the plaintiff of Civil Suit No. 5710/88 had joined as Clerk on the advocates' establishment of the appellant-Corporation with effect from 20.10.1970, and the plaintiff of Civil Suit No. 6175/88 had joined the service as a Clerk on the said establishment from 1.8.1962. Both the plaintiffs and other 6 Clerks on the advocates' establishment were not given benefits of revision of pay scales and therefore, they filed reference before the Industrial Tribunal being Reference (IT) No. 448/77. The Industrial Tribunal by its award dated 20.10.1982 had given benefit of revision in pay scales to the plaintiffs and other 6 clerks working on the Advocates' establishment, with effect from 1.1.1980. The said award was challenged by the appellant Corporation by filing SCA No. 1145/83. To decide the question whether both the plaintiffs were treated as employees of the Municipal

Corporation right from the respective dates of their joining the service on the advocates' establishment of the Corporation, it would be worthwhile to refer to the consent terms recorded in SCA No.1145/83. It is pertinent to note that the said consent terms came to be recorded by the Division Bench of this Court (Coram: PD Desai, Actg.CJ and GT Nanavati, J.)(as they then were) on 20th July, 1983. The consent terms are as follows :

" WHEREAS the respondents no. 2 to 9 through the Ahmedabad Municipal Corporation Nokar Mandal filed Reference (IT) No.448 of 1977 raising a demand that all Clerks working in the Advocates' Establishment be given the grades like other municipal employees AND WHEREAS the Industrial Tribunal by its Award dated 20th October 1982 made an Award directing the Ahmedabad Municipal Corporation to give the Clerks working in the Advocates' Establishment the grades stated in the Award AND WHEREAS the Ahmedabad Municipal Corporation has challenged the said Award in Special Civil Application No. 1145 of 1983 before the High Court of Gujarat AND WHEREAS in view of the uncertainty of the final decision of the Gujarat High Court in Special Civil Application No. 1145 of 1983 and in view of the fact that the subject-matter of the award concerned 8 workmen with whom the Municipal Commissioner had entered into contract for the purpose of their rendering service to the Advocates employed by the Ahmedabad Municipal Corporation and the further fact that though they were employed by the Municipal Commissioner under the contract for the purpose of rendering services to the Advocates employed by the Municipal Corporation they were not rendering any service to the Municipal Corporation and in view of the above fact and in view of the suggestion of the Hon'ble High Court to arrive at an amicable settlement treating the 8 workmen as a special class, IT IS NOW hereby agreed between the parties as under :

(a) that the 8 workmen mentioned in the Schedule would be absorbed in the Corporation services in their respective cadres in accordance with the equation made by the Industrial Tribunal in the award and the respondent workmen would be paid as per the award with effect from 1.1.1980.

(b) that the workmen among the eight mentioned in the schedule who are not qualified for being absorbed as municipal employees would be absorbed as such on and from the date when the Hon'ble High Court makes the order on these consent terms, and the requirement of the qualifications for the post would have been deemed to be waived only for the initial appointment as suggested by the Hon'ble High Court.

(c) as far as seniority is concerned, in the seniority list of Head Clerks and Senior Clerks, their names would be shown at the bottom of the seniority list. As regards Junior Clerks, their names would be entered at the bottom of the seniority list of Junior Clerks protecting their inter-se seniority.

(d) The 9 workmen would be entitled to future promotion from their respective cadres subject to the rules for such promotion only if they are qualified according to the municipal rules, regulations and bye-laws and the waiver of the initial qualification for their absorption in service would not be considered as waiver for future promotion. The unqualified workmen would have no claim for promotion to higher posts whether on a regular or on stop-gap basis unless (i) they acquire the required qualifications by the time they are due to be considered for promotion, and (ii) their record of service remains good. No workmen would have any lien whatsoever in the Advocates' Establishment now they having been absorbed in the municipal service.

(e) The terms of the Award dated 20th October, 1982 of the Industrial Tribunal in Ref.(IT) No.448 of 1977 stand modified by these consent terms.

(f) These among the 8 workmen mentioned in the schedule who have crossed the age of superannuation would not be eligible for absorption and the others would all be

subject to the Municipal Regulations in respect of the age of superannuation.

(g) The Municipal Corporation has entered into settlement with the workmen in view of the peculiar facts of the case and the suggestion of the High Court and this should not be considered by way of binding precedent in respect of other employees of the Corporation. "

If the consent terms are read minutely, it would be clear that the plaintiffs and other 6 employees had agreed that by virtue of the contract entered into between them and the Municipal Commissioner, they were rendering service to the Advocates employed by the Ahmedabad Municipal Corporation. The consent terms make it clear that by such service, they were not rendering any service to the Municipal Corporation. The plaintiffs and other 6 employees were absorbed in regular service of the appellant Corporation on the suggestion of the High Court treating them as a special class as they had rendered service to the Advocates of the Municipal Corporation. Clause (b) of the consent terms makes it abundantly clear that even though the 8 workmen including the plaintiffs were not qualified for being absorbed as municipal employees, the requirement of minimum qualification was waived for their absorption, on the suggestion of the High Court. By Clause (c), the plaintiffs were ordered to be placed at the bottom of the seniority list. This shows that they were for the first time absorbed in the regular service of the Municipal Corporation, when the consent terms were signed by the High Court. In other words, their irregular service came to be regularised from the date the consent terms were signed by the High Court. The plaintiffs cannot be treated on continuous service of the Municipal Corporation because Clause (b) of the consent terms makes it clear that even though they were not having the requisite qualification, the requirement of minimum qualification was waived and the plaintiffs were appointed as regular employees of the Corporation by making their appointment on the date of signing of the consent terms.

11. Prior to regularisation of the plaintiffs' services, they were working as Clerks on the Advocates' establishment of the Municipal Corporation, purely on contractual basis, and if the plaintiffs were working as advocates' clerks on contractual basis, it will not confer on them the status of a regular employee of the

Ahmedabad Municipal Corporation. The plaintiffs therefore, cannot claim that they were treated to be on continuous service right from their joining service as advocates' clerks of the Corporation. By virtue of the contract entered into between the Municipal Commissioner and the plaintiffs, they were only rendering service to the Advocates employed by the Corporation. By no stretch of imagination, it can be said that they were employees of the Corporation. After the consent terms were signed by the High Court, the plaintiffs were conferred the status of regular employees on the establishment of the Corporation, i.e. from 20.7.1983. The consent terms arrived at between the plaintiffs and the appellant Corporation make it abundantly clear that even though the plaintiffs were not qualified, they came to be appointed as employees of the Corporation for the first time in the year 1983. Admittedly, both the plaintiffs have retired on 31.7.1983, and therefore, they have not completed 5 years continuous service as per the pension scheme which was introduced by the Municipal Corporation and which came into force with effect from 1.1.1983.

12. Submission of the learned Counsel for the respondents- plaintiffs that the plaintiffs were treated to be in continuous service by the competent authority who granted them benefit of gratuity under the Act, and therefore, pensionary benefits should be extended to the plaintiffs is devoid of any merits. The order of the competent authority was passed ex-parte. It is true that the application for review of the said order filed by the Corporation came to be rejected. But it will not confer any status of continuous service of not less than 5 years on the plaintiffs. Had the consent terms were brought to the notice of the competent authority under the Act, it might not have granted the benefits to the plaintiffs. But in the present case, I am not concerned about the validity of the order of the competent authority under the Act. In my opinion, the order of the competent authority under the Act, will not be binding to the appellant Corporation. Pensionary benefits as claimed by the plaintiffs, under the Scheme can only be conferred on the plaintiffs if they fulfil the requirement of minimum 5 years continuous service with the appellant corporation. The plaintiffs' service as Clerks on the advocates' establishment of the appellant Corporation will not confer on them status of a regular employee of the Corporation because they were rendering service only to the Advocates employed by the Corporation purely by virtue of contract entered into between Municipal Commissioner and the plaintiffs.

13. It is also pertinent to note that looking to the service rendered by the plaintiffs by virtue of the contract entered into between the Municipal Commissioner and the plaintiffs, the High Court had treated them as a special class, and on the suggestion of the High Court, the plaintiffs and other six clerks on the Advocates' establishment were absorbed in the municipal service and they were appointed from July 20, 1983. By no stretch of imagination, it can be said that by the consent terms, the plaintiffs were ordered to be treated in continuous service right from the date of their joining as clerks on the advocates' establishment. The fact that the requirement of minimum qualification was waived shows that they were appointed for the first time on the establishment of the Municipal Corporation when the consent terms came to be recorded by the High Court. Therefore, the plaintiffs cannot claim that their service was continuous and they are entitled to claim pensionary benefits. The finding of the learned City Civil Judge that the order of the appellant Corporation not granting pensionary benefits to the petitioners is arbitrary, illegal and not maintainable, deserves to be set aside.

14. As a result of the foregoing discussion, the judgment and decree dated 25.9.1989, passed by the learned City Civil Judge, 5th Court, Ahmedabad in Civil Suit No. 5710/88 and Civil Suit No. 6175/88 are quashed and set aside. The appeals are allowed. However, in the facts and circumstances of the case, there shall be no order as to costs.

FURTHER ORDER:

After the above judgment is pronounced, learned Counsel for the Respondents Mr.MB Gandhi has requested to stay the operation and implementation of the same for a period of six weeks to enable the respondents to prefer LPA.

The request is granted. Operation and implementation of the judgement is stayed for a period of SIX WEEKS from today to enable the Respondents to prefer LPA.

Dt.28.2.1997. (M. H. Kadri, J.)

(abraham)